IN THE

Supreme Court of the United States

October Term, 1946.

No. 859

JULIUS HARTMANN, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF ANNIE C. GRUN, DECEASED,

Petitioner,

vs.

THE UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

REPLY BRIEF FOR PETITIONER (PLAINTIFF).

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CITATIONS.

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Respondent has filed a reply brief discussing two propositions (1) the question as to whether or not Plaintiff suffered any damage different than Perry in *Perry* v. *United States*, 294 U. S. 330, and (2) the question as to whether or not Plaintiff properly may recover a balance in accordance with the contract terms of the United States Liberty Loan Bonds. We shall examine each proposition.

(1)

Respondent continues to advance the irrelevant theory that Plaintiff is not entitled to receive gold because of the statutes which controlled use of the metal. This Court will, we are sure, not be lead into confusing the issues. We have repeatedly stated that we do not seek gold. We do not seek gold certificates. We seek devalued currency in an amount equal to the damages actually suffered by the breach of contract.

The cases cited by respondent (defendant) do not apply. *Ling Su Fan* v. *United States,* 218 U. S. 302, held that the respondent may control gold. We do not dispute this. We do not seek gold. We seek the actual damages in devalued currency that were suffered by petitioner for Defendant's failure to keep its promise in the bonds. *Bethlehem Steel Co.* v. *Zurich General Accident and Liability Ins. Co.,* 307 U. S. 265, cited by respondent, is likewise irrelevant. That case involved the liability of a private corporation, obligations of which are on a different footing than the obligations of the government itself. *Norman* v. *Baltimore & Ohio Railroad Co.,* 294 U. S. 240, *Perry* v. *United States,* 294 U. S. 330.

Uebersee Finanz Korporation Aktien Gesellschaft v. *Rosen,* 83 F. (2) 225, 230 (C. C. A. 2), certiorari denied, 298 U. S. 679 and *British-American Tobacco Co.* v. *Federal Reserve Bank,* 104 F. (2) 652; 105 F. (2) 935 (an action for conversion of gold) do not apply. They sought to recover and deal in gold. We do not seek gold.

Bakewell v. *United States,* 110 F. 2d 564, cited by the Defendant does not apply since Bakewell was unable to prove any damage. We have shown that the Plaintiff here has suffered great damage. We have already discussed *Nortz*

v. *United States* on Page 20 of our brief, saying, that in *Nortz* v. *United States,* 294 U. S. 317, this Court held that Nortz suffered no damage. There, no issue as to whether or not the Government could refuse to pay in gold was actually ever raised or determined, for Nortz concurred and did not dispute the power of the Government "to appropriate to the Government outstanding gold . . ." Nor do we dispute that power. The Court said, further: "The question Plaintiff presents is thus simply one of just compensation" (P. 328), and since Nortz surrendered his gold certificate before the dollar was devalued, he got currency still on a parity with the gold standard of value and sustained no actual loss (P. 329). Plaintiff in the present case, as we have shown, suffered actual loss.

The amount of Defendant's debt to Plaintiff was measured by the gold clause. That measure, not being paid in gold coin, should be paid in an amount of devalued currency of equal value. In other words, we ask the equivalent of devalued dollars. There is no law against paying the equivalent in devalued dollars, for the joint resolution providing for the payment of the gold clause bonds dollar for dollar in the nominal amount of the bonds was held unconstitutional and void as respects the government's own obligations in *Perry* v. *United States,* 294 U. S. 330 at Page 354. (The resolution is set forth as a foot note to Page 4 of our Petition for Certiorari). We respectfully state that the law entitling petitioner to recover damages for respondent's breach of contract has been fully developed in our petition and brief.

The bonds expressly provided for "the present standard of value". Respondent sought to pay by a lesser standard of value and petitioner thereby suffered the damages here sought.

As Chief Justice Hughes said in *Perry* v. *United States*, 294 U. S. 330 at Page 348:

> "This obligation must be fairly construed. The 'present standard of value' stood in contradistinction to a lower standard of value. The *promise obviously was intended to afford protection against loss.* That protection was sought to be secured by setting up a standard of measure of the Government's obligation. We think that the reasonable import of the promise is that it was intended to assure one who lent his money to the Government and took its bond that he *would not suffer loss through depreciation in the medium of payment.*" (P. 348). (Italics ours.)

We have more fully set forth the details of the damages in question and the distinguishing features between Perry's and Plaintiff's positions on Pages 21, 22 and 23 of our brief in support of and bound with our petition for certiorari.

(2)

In Respondent's Reply, the contention is advanced that the surrender of the bonds and acceptance of payment in current legal tender affected a full discharge of the obligation. This is not the law. Such a rule would put a blessing on breaches of contract, and would discourage and defeat the plaintiff's right and duty to mitigate his damages. The defendant is a sovereign. The plaintiff made demand upon the defendant to honor the bonds in accordance with the defendant's solemn pledge. The defendant refused. The plaintiff, at a later time, made further demand upon the defendant to honor this obligation. The defendant again refused, stating that it would not honor the obligation by its terms, by payment in gold or its equivalent. The Congress (48 St. L. 51, as amended 48 St. L. 342) gave the President power to devalue the dollar more than he did on January 31, 1934, and the Presidential executive order of that date expressly reserved the power to further devalue

the dollar. Proc. No. 2072, Jan. 31, 1934, 48 Stat. 1730. Under those circumstances, the plaintiff had already suffered great loss and was justly fearful that a further devaluation of the dollar would occur to cause even greater loss. No principal of equity or justice prevents a creditor who has suffered such loss without his fault from "taking what he can get on his contract when he can get it" without waiving his claim for the balance. (*Holmes, J., St. Louis H. & C. Co.* v. *U. S.*, 191 U. S. 159; *Proctor* v. *Fitchburg Railroad*, 166 Mass. 119, 123.) He need not stand by and invite further loss when the debtor has expressly refused to honor its solemn promise and claims the power to cause further damage.

Partial payment was accepted under protest and under demand for the balance due. There is nothing in *Smyth* v. *United States* (302 U. S. 329 where the question was purely one concerning the option to call the bonds and where no damage arose) which gives moral or legal respectability to a circumstance in which the sovereign defendant can first, by arbitrarily dishonoring its obligations, force the plaintiff into a position helplessly to venture further loss by a new devaluation of the dollar. Plaintiff had the duty of mitigating his damages by temporarily recovering what he could and then seeking his remedies in Courts of Justice for the balance.

The case of *Savage* v. *United States* (92 U. S. 382) is no authority for the defendant. There, a plaintiff held a security of the United States which did not contain a gold clause provision for payment. There was no statute of the United States promising to pay the security in gold or equivalent. There was but a circular in general terms issued by a sub-agent (not the Secretary of the Treasury), indicating payment in gold. There was no statute authorizing the issuance of such Treasury circular. A dispute

arose as to whether or not there was a clear intention of the parties that the obligation should be paid in gold, and whether the circular bound the government. The Court of Claims had made a finding which the Supreme Court did not disturb that, "the subscription agent had no lawful authority to make the statement contained in the advertisement". The Supreme Court decided that the plaintiff intended to waive his claim because he expressly said in his correspondence that the notes were surrendered in accordance with the terms proposed (p. 389). The question was one of fact: the intention of the plaintiff. The Court certainly did not decide that the surrender of the note *ipso facto* was a waiver as a matter of law. The facts in the present case show several protests and demands, always reserved, and there is no evidence of waiver. And there never was a *bona fide* dispute as to the existence of a clear contract, prerequisite of accord and satisfaction. (*Fire Insurance Association* v. *Wickham*, 141 U. S. 564). Thus, whether the *Savage* case rests fundamentally on the question of intentional waiver or accord and satisfaction, the facts are far ~~from~~ different in the present case. Above all the Supreme Court said that the acceptance must always be, "voluntary, and without intimidation" (p. 388). Certainly, these elements were lacking here (*Union Pacific Ry. Co.* v. *Public Service*, 248 U. S. 67).

Mr. Justice Brandeis in the case of *St. Louis B. and M. RR. Co.* v. *United States*, 268 U. S. 169, (cited by defendant) examined the law and clearly held that an acquiescence even without protest where the party clearly does not intend to surrender his rights for the balance is no waiver. It is true that the surrender of the security may be evidence of waiver. No such evidence exists in the present case, for on two occasions the plaintiff reserved all rights and made known that no waiver was intended.

In *City of San Juan* v. *St. John's Gas Co.* (195 U. S. 510, at pp. 522-3) cited by defendant, the Court said:

> "True it is, as pointed out in *Fire Insurance Association* v. *Wickham,* 141 U. S. 564, it must appear that the alleged dispute really existed and did not arise from an arbitrary denial by one party of an obligation which was obviously due . . . the proof established that there was a bona fide dispute in this case . . . from the very inception of the contract . . . the parties differed as to the medium of payment. . . ." (p. 522.)

There never was any doubt when the bonds were issued or at any time that the gold clause meant what it said. But the defendant arbitrarily refused to perform. There was no *bona fide* dispute, a prerequisite of an accord and satisfaction. (*Fire Insurance* v. *Wickham,* 141 U. S. 564.) We have examined all the cases cited by defendant. None of them apply. Those cases all involve a *bona fide* dispute arising out of the intentions of the parties.

In *Willard Sutherland* v. *United States,* 262 U. S. 489, cited by defendant, there was no express contract at all. This was true in *Western Pac.* v. *U. S.,* 59 Ct. Cls. 67, and *So. Pac.* v. *U. S.,* 59 C. Cls. 36, where the exact amount due was open on the question as to whether or not land grant deductions applied. But even here, on appeal the United States Supreme Court reversed these *Western Pacific* (268 U. S. 271) and *Southern Pacific Co.* (268 U. S. 263) cases and allowed the claims where there had been a protest, although money had been accepted, for the protest showed that no acquiescence was intended.

In the present case, the defendant's contract is a clear moral and legal obligation created by statute. The words are simple and clear. The statute expressly guarantees payment in gold coin, the solemn act of the Congress of the United States. There certainly could be no *bona fide* dis-

pute about that. There is nothing magical about the paper on which the bonds were written. The paper did not give birth to the contract rights but merely records them. The Congressional Law created the contract. The plaintiff reserved all rights under the law—and never waived them. The fact that the defendant has physical possession of the bond paper does not alter those rights. The rights of a party under that law are not affected by the place where the bonds happen to be, since the plaintiff never waived his contract rights.

And there is a further protection to plaintiff. The defendant is a great sovereign power of overwhelming strength. The plaintiff is a mere human being. The defendant acted arbitrarily. If the plaintiff held the bonds, he would have subjected himself to the power of the defendant to further devalue the dollar and cause greater loss. The Supreme Court held that in such circumstance of contrasting power, the plaintiff would not be bound, since he was entitled to protect himself as best he could in the circumstance in which the defendant placed him. (*Union Pacific R. Co.* v. *Public Service Co.*, 248 U. S. 67.)

The facts show that plaintiff never intended to waive and never did waive his rights. The Court of Claims decision treated plaintiff's claim as one of substance, not as one where any rights were surrendered (*Hartmann* v. *United States*, 106 C. Cls. 686). He is entitled to recover damages for the loss sustained. (*Perry* v. *United States*, 294 U. S. 330; *Lynch* v. *United States*, 292 U. S. 571; *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481) and we respectfully asks that the petition for certiorari be granted.

Conclusion.

The decision below did not correctly follow the decision of this Court in the *Perry* case and in the numerous other cases holding that actual damages for breach of contract shall be allowed to Plaintiff. The Plaintiff is entitled to recover the damages actually suffered for breach of contract.

Payment of these damages would cause no great economic loss to the Defendant, as no other like suit may be brought, the consent to be sued having since been withdrawn. It cannot be denied that a great moral sense is involved. Our Nation seeks to maintain moral leadership among nations, not the least of which is to set an example that the promises of nations are not to be used to cause damage to those who relied thereon:

The petition for a writ of certiorari should, therefore, be allowed.

Respectfully submitted,

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